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No. 90-749

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In the Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF SOUTH DAKOTA, ET AL., PETITIONERS

v.

ROSEBUD SIOUX TRIBE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the State of South Dakota successfully assumed jurisdiction under Public Law 280 by passage in 1961 of a statute that provided for state jurisdiction only over events occurring on highways in Indian country and that did not provide for assumption of full jurisdiction at the request of the Tribes.

2. If so, whether the 1961 statute remained in effect after enactment of the Indian Civil Rights Act of 1968 (which added a requirement of tribal consent to further state assumptions of jurisdiction under Public Law 280), even though at the time Congress was considering the 1968 Act South Dakota advised Congress that it was not exercising jurisdiction and that it did not believe it had jurisdiction, because the 1961 statute had been held invalid by the South Dakota Supreme Court.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. In 1889, Congress passed the Enabling Act that enabled Washington, Montana, North Dakota, and South Dakota to become States. Act of Feb. 22, 1889, ch. 180, 25 Stat. 676 (Enabling Act). To provide for continued federal supervision of the Indian tribes located in the new States, Section 4 of the Enabling Act required that the constitutional conventions of the prospective States include in their constitutions, "by ordinances irrevocable without the con-

sent of the United States and the people of said States," provisions by which

> the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title * * * to all lands * * * owned or held by any Indian or Indian tribes; and that * * * said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.

Enabling Act § 4, 25 Stat. at 677. In accordance with this provision, Article XXII of the South Dakota Constitution contains the same operative language.

2. In 1953, in response to the "problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement," *Bryan* v. *Itasca County*, 426 U.S. 373, 379 (1976), Congress passed the Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, commonly known as Public Law 280. The first five Sections of Public Law 280 ceded all criminal and civil jurisdiction over matters involving Indians in Indian country (with exceptions for certain specified reservations) to five named States (referred to as mandatory States), which did not include South Dakota. 67 Stat. at 588-590. Sections 6 and 7 granted all other States (referred to as option States) the option of assuming jurisdiction. First, Section 6 dealt with the problem faced by States (referred to as disclaimer States), such as South Dakota, whose constitutions prohibited any assumption of jurisdiction in provisions that could not be amended without the consent of the United States; Section 6 granted the consent of the United States to the people of any State to amend their constitutions "to remove any legal impediment to the assumption of civil and criminal jurisdiction." 67

Stat. at 590. Second, Section 7 dealt with all remaining States, providing consent for them "to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislation, obligate and bind the State." *Ibid.* Most importantly, Public Law 280 did not require the consent of the Indian tribes as a condition to the assertion of state jurisdiction.[1]

3. South Dakota has responded to Public Law 280 with four separate statutes, each of which attempted to accept all or part of the jurisdiction described in Public Law 280. For various reasons, three of those statutes no longer are in effect. See Pet. 5-6, 8 (discussing 1957, 1959, and 1963 statutes). This case involves the remaining statute, which was passed in 1961. The statute provided for immediate assumption of jurisdiction "as to criminal offenses and civil causes of action arising on any highways," and for complete assumption of all criminal and civil jurisdiction upon a proclamation by the governor that the federal government "has made proper provision for the reimbursement to [South Dakota] for the added costs in connection with the assumption of said jurisdiction." S.D. Codified Laws Ann. 1-1-21 (1985). Because the governor has not issued such a proclamation, this statute effectively assumed only jurisdiction related to highways.

Pursuant to the 1961 statute, South Dakota apparently exercised jurisdiction over highways in Indian country from 1961 to 1964. In 1964, however, the South Dakota Supreme Court, applying federal law, ruled that the 1961 enactment was invalid be-

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[1] For a general discussion of Public Law 280, see *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 471-474 (1979).

cause it did not comply with Public Law 280. *In re Hankins*, 80 S.D. 435, 125 N.W.2d 839 (1964). The two principal bases for the court's holding were, first, its conclusion that Public Law 280 did not authorize assumption of jurisdiction "over only a portion or part of a reservation," 80 S.D. at 442, 125 N.W.2d at 843, and, second, its view that the 1961 statute, by virtue of its being limited to highways, did not serve the purposes of Public Law 280. Instead, "it would proliferate the law enforcement authorities in Indian country by adding the state as another entity with geographically limited jurisdiction." 80 S.D. at 443, 125 N.W.2d at 843. Accordingly, South Dakota ceased enforcing the 1961 statute in 1964.[2]

4. During the 1960's, Congress became dissatisfied "with the involuntary extension of state jurisdiction over Indians who did not feel they were ready to accept such jurisdiction, or who felt threatened by it." *Three Affiliated Tribes* v. *Wold Engineering, P.C.*, 476 U.S. 877, 892 (1986); see Pet. App. A30-A32. In response to this and other concerns, Congress in 1968 enacted Title IV of the Civil Rights Act of 1968, commonly known as the Indian Civil Rights Act, Pub. L. No. 90-284, 82 Stat. 73, codified at 25 U.S.C. 1301 *et seq.* Sections 401(a) and 402(a), 25 U.S.C. 1321(a) and 1322(a), established a new rule for assumption of criminal and civil jurisdiction over Indian country by "any State not having jurisdiction," permitting new assumptions of jurisdiction only "with the consent of the Indian tribe." Similarly, Section 403(b), 25 U.S.C. 1323(b), re-

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[2] About the same time, the South Dakota legislature's last attempt at assuming jurisdiction over Indian country failed when it was defeated in a referendum vote by a 3 to 1 margin. Pet. App. A10-A11.

pealed Section 7 of Public Law 280 (which, as discussed above, had permitted assumption of jurisdiction by unilateral state action), but provided that the repeal "shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal."

5. Thereafter, in *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979), this Court addressed the permissibility of partial assumptions of jurisdiction under Public Law 280. That case involved a statute enacted by Washington—a State covered by the same Enabling Act as South Dakota and thus, like South Dakota, a disclaimer State subject to the provisions of Section 6 of Public Law 280. The statute in question asserted full criminal and civil jurisdiction over non-trust, fee lands within Indian country. With respect to other land in Indian country, the measure asserted jurisdiction over eight subject-matter areas, including such matters as operation of motor vehicles on highways, domestic relations, juvenile delinquency, and adoption proceedings. See 439 U.S. at 465 n. 1. The statute also provided that the State would assert full criminal and civil jurisdiction over Indian country at the request of the Tribe concerned.

This Court rejected the contention that Public Law 280 did not permit disclaimer States (such as Washington and South Dakota) to assume only a portion of the jurisdiction permitted by Public Law 280. It looked first to the language in Section 7 of Public Law 280, which "permits option States to assume jurisdiction 'in such manner' as the people of the State shall 'by affirmative legislative action, obligate and bind the State to assumption thereof.'" 439 U.S. at 495. This Court observed that "[o]nce the requirements of § 6 have been satisfied, the terms of

§ 7 appear to govern the scope of jurisdiction conferred upon disclaimer States." *Ibid.*

This Court further explained that a contrary conclusion would have been inconsistent with the purpose of Public Law 280:

> Section 6 * * * was essentially an afterthought designed to accomplish the limited purpose of removing any barrier to jurisdiction posed by state organic law disclaimers of jurisdiction over Indians. All option States were originally treated under the aegis of § 7. * * * Indeed, to the extent that the Tribe and the United States suggest that the disclaimer States stand on a different footing from all other option States, their argument makes no sense. It would ascribe to Congress an intent to require States that by force of organic law barriers may have had only a limited involvement with Indian country to establish the most intrusive presence possible on Indian reservations, if any at all, and at the same time an intent to allow States with different traditions to exercise more restraint in extending the coverage of the law.

439 U.S. 496-497.

But the Court did not resolve the case solely on the basis of this analysis. Instead, it explicitly stopped short of saying that all partial assumptions are permissible; it concluded only that the phrase " 'in such manner' * * * is at least broad enough to authorize a State to condition the extension of full jurisdiction over an Indian reservation on the consent of the tribe affected." This Court supported its conclusion by pointing out that the Washington scheme was particularly compatible with the law enforcement purposes of Public Law 280 because it did "not reflect

an attempt to reap the benefits and to avoid the burdens of the jurisdictional offer made by Congress." 439 U.S. at 498. Because the statute provided for complete assumption of jurisdiction at the Tribe's request, the Tribe had a remedy at hand if the partial assumption led to any practical difficulties in law enforcement; the Tribe could ask the State to assume full jurisdiction. *Id.* at 498-499.

6. In reliance on *Yakima*, the State of South Dakota concluded that, notwithstanding the 1964 decision of the South Dakota Supreme Court in *Hankins* and passage of the Indian Civil Rights Act of 1968, it was entitled to assert jurisdiction under the 1961 statute over conduct taking place on highways in Indian country. Respondents accordingly instituted this action in the United States District Court for the District of South Dakota. On March 31, 1989, that court granted the State's motion for summary judgment. First, relying on a recent decision of the South Dakota Supreme Court,[8] the court concluded that the 1961 statute was still in effect.

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[8] See *State* v. *Onihan*, 427 N.W.2d 365, 370 (S.D. 1988). *Onihan* did not clearly address the question whether, as a matter of state law, a statute invalidated as inconsistent with federal law is voided, or simply suspended, so that it automatically springs back into existence upon a change in federal law. A strong argument could be made, as a matter of South Dakota law, that after *Hankins* the 1961 statute was completely void and thus could not spring back into effect to justify jurisdiction after *Yakima*. See S.D. Codified Laws Ann. § 1-1A-1 (1985) ("every statute * * * of the state of South Dakota enacted * * * in contradiction to the provisions of the United States Constitution, and so judicially determined by a final judgment rendered by the South Dakota Supreme Court * * * is *void* within the jurisdiction of the state of South Dakota" (emphasis added)).

Pet. App. A79-A80. Relying on *Yakima* and its view of the policies underlying Public Law 280, the court concluded that the statute satisfied Public Law 280. Pet. App. A80-A94. Finally, the court rejected the contention that the State's resumed exercise of jurisdiction violated the Indian Civil Rights Act because it occurred without the Tribe's consent. *Id.* at A95-A104. The court reasoned that the Indian Civil Rights Act expressly stated that it would have no effect on jurisdiction that already had been assumed, and that the consent requirement set forth in Sections 1321 and 1322 applied only to new assumptions of jurisdiction after 1968. Because South Dakota had assumed jurisdiction in 1961, the Indian Civil Rights Act did not apply. *Id.* at A102-A104.

On appeal, the court of appeals reversed. First, it concluded that the 1961 statute did not comply with Public Law 280. The court distinguished *Yakima* in two ways. First, the Washington statute upheld in *Yakima* provided that the State would assume full jurisdiction upon the request of the tribe involved. Therefore, the Washington statute could not be construed as "an attempt to reap the benefits and to avoid the burdens of the jurisdictional offer made by Congress." Pet. App. A22 (quoting *Yakima*, 439 U.S. at 498). By contrast, the court reasoned, the South Dakota scheme takes jurisdiction only over the area most likely to generate significant revenues—enforcement of traffic laws—and conditions assumption of full jurisdiction on federal reimbursement. *Id.* at A25. Second, the court concluded that the South Dakota statute did not adequately advance the purposes of Public Law 280, because such a limited assumption of jurisdiction would not significantly limit reservation lawlessness or reduce the federal presence on the reservation. *Id.* at A26-A28.

As an alternative basis for its holding, the court concluded that South Dakota's "retroactive application of a new statutory interpretation," put into effect without tribal consent, violated the requirement of consent set forth in the Indian Civil Rights Act of 1968. Pet. App. A29. It ruled that Congress intended to "eliminate completely the ability of a state to assume jurisdiction, without tribal consent, at any time and in any manner after 1968." *Id.* at A33. The tribes therefore had a vested right in the tribal consent requirement that precluded the retroactive application of the *Yakima* construction of Public Law 280 to validate the 1961 assertion of jurisdiction. *Id.* at A43.

DISCUSSION

In our view, the correct answers to the questions presented by the court of appeals' decision are open to debate, but there is no reason for this Court to decide these questions. This case is entirely unique; it involves purely historical questions regarding a statute repudiated by Congress more than two decades ago. Moreover, reversal of the decision below and disturbance of the status quo on the South Dakota reservations would call into question convictions secured by the United States in the reasonable belief that South Dakota did not have jurisdiction.

1. The State's first contention is that the court of appeals misapplied this Court's decision in *Yakima*. At the heart of the court of appeals' decision on this point was its conclusion that this case should be treated differently because South Dakota's offer to assume jurisdiction was not nearly as broad as the offer at issue in *Yakima*. As the court's opinion demonstrates, Pet. App. A20-A24, certain passages in the *Yakima* opinion support this reading. The

most important of these appear in the last three paragraphs of Part IV of the *Yakima* opinion, 439 U.S. at 498-499, in which this Court responded to the United States' contention that the partial assumption of jurisdiction under the Washington statute was inconsistent with the purposes of Public Law 280. As we discussed above, pp. 6-7, this Court did not reject the United States' argument outright, but instead explained that in its view the Washington statute *did* fulfill the purposes of Public Law 280 because, among other things, it provided that the State of Washington would assume full jurisdiction upon the request of the Tribe.

We agree with the court of appeals' conclusion that the South Dakota statute is less compatible with Public Law 280 than Washington's statute was. South Dakota's assumption of nothing more than highway jurisdiction—which might be thought to finance itself—without any of the more burdensome types of jurisdiction assumed by Washington in *Yakima* (such as domestic relations and juvenile delinquency) suggests that the State here, unlike Washington in *Yakima*, is in a position to "reap the benefits and to avoid the burdens of the jurisdictional offer made by Congress," *Yakima*, 439 U.S. at 498. Moreover, because the State is not offering to assume full jurisdiction upon the Indians' request, any practical problems caused by this partial assumption will remain in effect indefinitely.

On the other hand, it is by no means clear that these portions of the opinion were necessary to the holding. *Yakima* can be read, rather, to turn solely on the Court's interpretation of the statutory language, rather than its views as to the closeness of the fit between the Washington statute and the goals of

Public Law 280. Read from this perspective, *Yakima* would represent a conclusion that Section 7 of Public Law 280 comprehensively permitted partial assumptions of jurisdiction "in such manner as the people of the State shall" provide. Under this reading, there would be no need for courts to engage in a case-by-case analysis of the extent to which particular state statutes are compatible with the policies of the 1953 federal statute.

This reading of *Yakima*, though, effectively would render superflous the passages discussed above, in which the Court justified the Washington statute as substantially furthering the overall policies of Public Law 280. In sum, the *Yakima* opinion does not clearly resolve the issue presented by this case — which is essentially whether *Yakima* validates *all* partial assumptions, or only those not demonstrably incompatible with the policies of Public Law 280. The latter interpretation is, in our view, the one more in keeping with the Court's settled practice of strictly construing statutes that terminate tribal authority or transfer it to the States, see *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986); *Solem* v. *Bartlett*, 465 U.S. 463, 470-472 (1984); *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 412-413 (1968), and with the special rules governing preemption of state authority over Indian reservations, see, *e.g.*, *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 332-336 (1983); *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 176-177 (1989). Accordingly, we believe the court of appeals correctly concluded that the rule of *Yakima* does not properly extend to the much more extremely selective assumption of jurisdiction at issue here and, hence, that the 1961 state statute was not an effective assumption of jurisdiction under Public Law 280.

2. The second question raised by the State challenges the court of appeals' alternative holding that, even if South Dakota's 1961 statute validly assumed jurisdiction at that time, it cannot be resuscitated without tribal consent after enactment of the Civil Rights Act of 1968. Like the first question, this raises a unique issue to which the answer is not entirely clear.

We may assume *arguendo* that *Yakima* would be treated as fully retroactive in the sense that the South Dakota decision in *Hankins* would be regarded as having been incorrect even in 1964 and that *Hankins* did not invalidate the state statute, but only suspended its effect until this Court undermined the *Hankins* analysis in *Yakima*, see discussion, p. 7 & n.3, *supra*. But even so, it remains unclear whether the state statute could be given effect under *federal* law—as manifesting a valid assumption of jurisdiction under Public Law 280—after passage of the Civil Rights Act of 1968.

It is true that Section 404(b) of the 1968 Act, 25 U.S.C. 1323(b), provides that the 1968 Act does not "affect any cession of jurisdiction made pursuant to [the former Section 7] prior to its repeal." But this does not necessarily resolve the question. In light of the practical and legal circumstances that existed in 1968—the South Dakota Supreme Court in 1964 had held the state statute invalid under federal law, South Dakota therefore was not in fact exercising any jurisdiction over offenses by or against Indians from 1964 to 1968, and representatives of South Dakota specifically informed Congress while it was considering the 1968 Act that the State was not exercising and did not then have power to exercise such

jurisdiction[4]—there is a substantial argument that in 1968 South Dakota was a State "not having jurisdiction" over offenses by or against Indians on highways in Indian country, as described in 25 U.S.C. 1321(a), and that it thereafter could acquire such jurisdiction only with the consent of the Tribes concerned.

At bottom, the question is whether when Congress referred to States "having jurisdiction," it was using the term in a narrow technical sense (asking whether the State might at some point be held to have had the theoretical power to decide cases and enforce its judgments) or in a more practical sense (asking whether the State was recognized as having jurisdiction and actually was devoting enforcement and prosecutorial resources to the exercise of that jurisdiction). Although at first blush the narrower reading of the term may seem more natural, there are substantial arguments to the contrary. The reference to jurisdiction in the 1968 statute amending Public Law 280 surely should be interpreted in light of the requirements of Section 7 of Public Law 280 itself, which authorized state assumption of jurisdiction only if the people "shall * * * obligate and bind the State to assumption thereof." It is difficult to conclude that South Dakota was obligated and bound to assumption of jurisdiction in 1968, when the highest court of that State had held its assumption invalid four years previously and the State was not exercising jurisdiction because of its belief that it did not have jurisdiction.

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[4] See, *e.g.*, *Constitutional Rights of the American Indian: Hearings Before the Subcomm. on Constitutional Rights to the Senate Comm. on the Judiciary, S.961, S.962, S.963, S.964, S.965, S.966, S.967, S.968, and S.J. Res. 40*, 89th Cong., 1st Sess. 117 (1965) (statement of South Dakota Assistant Attorney General); *id.* at 16 (statement of Senator McGovern). For a detailed discussion, see Br. in Opp. 11-13.

This position is buttressed by the uncontradicted views presented to Congress in 1968 that South Dakota was not one of the States that had assumed jurisdiction under Public Law 280.[5] In light of the canon that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 766 (1985), we believe the court of appeals was correct in concluding that the 1968 Act's requirement of tribal consent properly applies to the unusual circumstance of subsequent reinstitution of state authority presented here.

3. Whatever the correct view of the merits of the case, practical considerations strongly suggest that this case does not warrant further review. Most importantly, the situation in South Dakota is unique, so a decision by this Court would be unlikely to provide substantial guidance to any other jurisdiction. On this point, we disagree with the State's suggestion, Pet. 14-15, that three other States have similar partial assumption statutes that the rationale of this case would govern.[6] The first of these, Arizona, is

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[5] See Pet. App. A32-A33; Br. in Opp. 11-13.

[6] Although petitioner does not address it, Nebraska apparently has adopted a jurisdictional scheme similar to that of South Dakota over the Omaha Indian Reservation through a retrocession of jurisdiction accepted by the Secretary of the Interior under 25 U.S.C. 1323(a). Litigation over the validity of that retrocession ended almost twenty years ago. See *Omaha Tribe* v. *Village of Walthill*, 334 F. Supp. 823 (D. Neb. 1971), aff'd per curiam, 460 F.2d 1327 (8th Cir. 1972), cert. denied, 409 U.S. 1107 (1973). Because Nebraska was one of the jurisdictions *required* to accept jurisdiction under Public Law 280, this partial assumption was accomplished through the discretionary acceptance of a retrocession by the Secretary of the Interior, exercised at the behest of the Tribe. Thus, clarification of the law with respect to South Dakota

said to have exerted jurisdiction over air pollution. In light of the Court's holdings that Public Law 280 does not grant general authority to exercise regulatory jurisdiction over Indian country, see *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 207-208 (1987); *Bryan* v. *Itasca County*, 426 U.S. 373, 383-390 (1976), the validity of Arizona's claim is subject to serious doubt for reasons not implicated here. Moreover, this scheme is likely to change in the immediate future, because the 1990 Amendments to the Clean Air Act have granted the Administrator of the EPA authority to determine whether States or Indian tribes should exert Clean Air authority on reservations. Act of Nov. 15, 1990, Pub. L. No. 101-549, § 107, 104 Stat. 2464-2465. The other two States, Montana and Iowa, have regimes dramatically different from the South Dakota scheme before this Court. Montana has exterted full criminal jurisdiction over the Flathead Reservation, Iowa full civil jurisdiction over the Sac and Fox Reservation. Because, unlike South Dakota, these States have not carved out particular subject matters over which to accept jurisdiction, their statutes do not have the defects the Eighth Circuit identified in the South Dakota statute. Finally, we are aware of no other assumption statute declared invalid by a lower court before 1968 and sought to be resuscitated in light of *Yakima*. Thus, any attention the Court may give to this point would be unlikely to have application to any other case.

Furthermore, as we have discussed above, pp. 4-5, the policies Congress was pursuing when it enacted

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would not affect the situation in Nebraska; because the Tribe has consented to the jurisdictional situation, Nebraska's situation is much closer to *Yakima* than the case at hand.

Public Law 280 in 1953 do not comport with its goals under current federal Indian policy. In particular, Congress explicitly has rejected the portion of Public Law 280 on which South Dakota relies here, which allows a State, without the consent of the affected Indians, to assume jurisdiction over offenses by or against Indians in Indian country. Whatever the technical merits of the court of appeals' decision, the bottom line of the decision, which prevents South Dakota, without the consent of the affected Tribes, from assuming jurisdiction it did not claim to have and was not exercising as of 1968, is consistent with current federal Indian policy as embodied in the 1968 Act. In sum, there is no need for the Court in this unique case to undertake to ascertain the intent Congress had under a 1953 statute when the only effect a reversal could have would be to undermine the policy Congress has expressed in more recent statutes.

The decision below leaves no jurisdictional void. The United States will continue to have jurisdiction over crimes committed by or against Indians on reservation highways in South Dakota, as elsewhere in Indian country in that State; the Tribes will continue to have concurrent jurisdiction over crimes committed by their members; and the State will continue to have jurisdiction over crimes committed by non-Indians that do not involve Indian victims. If any inefficiencies appear in this allocation of authority, the federal government, the Tribes, and state officials may enter into cross-deputization agreements, as they have before.

We note that the United States has taken its responsibility seriously. For example, we have been advised by the office of the United States Attorney for the District of South Dakota that since 1988 the United States has secured at least 30 convictions for

involuntary manslaughter on the highways in South Dakota Indian country, as well as an unspecified number of convictions for murders, assaults, and rapes. Similarly, the Tribes have sought vigorously to enforce laws against drunk driving; as the record in this case shows, in the three years preceding this lawsuit 901 citations were issued by tribal officers for driving under the influence. C.A. App. 806-807. Reexamination of this status quo would cast a shadow on the past federal criminal convictions in South Dakota.[7] Moreover, if the Court were to accept South Dakota's claim that it has exclusive criminal jurisdiction over those highways, see Pet. 39-46, it would call into question the validity of all convictions since 1961, even convictions secured by the Tribes.[8]

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[7] It is not clear that assumption of jurisdiction by South Dakota would have ended federal jurisdiction, because the effect on federal jurisdiction of an option State's assumption of jurisdiction under Public Law 280 is unclear. Public Law 280 expressly provides that federal jurisdiction no longer applies in areas where jurisdiction was ceded to mandatory States. See 18 U.S.C. 1162(c). The absence of any such provision with respect to option States supports an argument that federal jurisdiction would continue even after the State assumed jurisdiction. See *United States* v. *High Elk*, 902 F.2d 660 (8th Cir. 1990) (per curiam) (reaching this result). But the structure of Public Law 280 and the general disaffection Congress has expressed with concurrent state-federal jurisdiction over Indian country can support substantial arguments to the contrary. See Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 549-550 (1976) (arguing that assumption of Public Law 280 jurisdiction by option States ends federal jurisdiction).

[8] We disagree with the State's argument on this point. Nothing in Public Law 280 suggests it was intended to divest the tribes of their inherent criminal jurisdiction. In light of Public Law 280's express statement that assumption of juris-

Finally, we point out that the South Dakota Supreme Court has acceded to the decision of the Eighth Circuit in this case. See *South Dakota* v. *Spotted Horse*, No. 16644 (Oct. 4, 1990), Br. in Opp. App. 8a-9a.[9] Accordingly, there is no remaining likelihood that the state and federal judicial systems will render contrary decisions on this point. Cf. *Solem* v. *Bartlett*, 465 U.S. at 466 (suggesting that this Court granted certiorari to settle such a conflict).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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diction by the States would divest the United States of jurisdiction, see 18 U.S.C. 1162(c), congressional silence on this point strongly suggests that tribal jurisdiction remains intact. See *Walker* v. *Rushing*, 898 F.2d 672, 675 (8th Cir. 1990).

[9] A petition for a writ of certiorari, No. 90-1003, is pending in this Court seeking review of that decision. For the reasons discussed in this brief, we believe the petition in that case also should be denied.

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